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BOOK REVIEWS

JUSTICE FRANKFURTER AND CIVIL LIBERTIES, by Clyde E. Jacobs, University of California Press, 1961, 265 pages. Price: \$5.00.

Professor Clyde E. Jacobs of the University of California has supplied a thought-provoking book on one of the Supreme Court's most controversial members. Referred to in the first chapter as a "libertarian activist," Felix Frankfurter, after a pre-Court career earning him that reputation, disappointed many expectations by subsequent judicial performance within the restraintist tradition. Dr. Jacobs skillfully seeks to explain why, mainly in terms of his subject's decisions and opinions in leading cases since 1939 which reflect "the thought and action of a lifetime."

First Amendment freedoms receive the most attention; they are discussed in four of the book's impressively documented nine chapters. Holmes's opinions on free speech—which he considered to be endowed "with a momentum for respect" lacking when appeal is made to economic liberties"¹—are set forth as a sourcebook for the constitutional protection of freedom of expression. As a self-proclaimed disciple, Frankfurter parts company with libertarian activists like Black and Douglas who seek to derive from the master a preferred position for liberty guarantees. They distort the master's employment of a felicitous literary phrase about "clear and present danger" into a criterion of constitutionality. This would lead to a deplorable mechanical jurisprudence based upon absolutistic conceptions.

Instead of this, Frankfurter offers a pragmatic, de-personalized, case-by-case approach, most evident perhaps in due process cases, which stresses factual analysis in the Brandeis tradition and relies on the ancient common law standard of reasonableness inherited from England, as best calculated to ensure judicial self-restraint. Nonetheless, the author is able to discern what he calls "Frankfurter's moderate judicial activism in cases arising under the Fourth, Fifth, and Sixth Amendments."²

Certain values such as separation of church and state, academic freedom, and the right to privacy stand high in the Justice's estimation and hence weigh heavily on his scales of judgment. Sometimes, competing interests (*e.g.*, free speech versus national security) appear so evenly balanced that what he has to say on the problem (witness his concurring opinion in the

1. JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES 33 (1961).

2. *Id.* at 153.

well-known *Dennis* case) invites criticism as amounting to "a study in 'ambivalence.'" ³

Not one to be dissuaded by charges of conservatism on the bench, Frankfurter throughout a fairly consistent judicial career has held steadfastly to his convictions regarding the limited role of an inherently oligarchic judiciary in our democracy whose channels of political expression must remain untrammelled. In a conscientious effort to be realistic, he constantly insists that ultimate decisions should be left to the popular organs of government, even when contrary to his sensitively libertarian personal credo (as was plainly indicated in the compulsory flag salute dilemma).

As Professor Jacobs accurately concludes, Frankfurter's jurisprudence is the product of a fundamental but paradoxical "realization that judges . . . often contribute most when they essay little," ⁴ however unflattering that may sound to some of those concerned.

ROYAL C. GILKEY*

ACT OF ANGER, by Bart Spicer, McClelland & Stewart Ltd., 1962, 505 pages. Price: \$5.95.

Exciting, sophisticated, enlightening—these words describe *Act of Anger*, a big novel which reveals the tension and forthright courage of courtroom drama.

Set in the southwestern United States, the novel presents a vivid picture of three main characters. Burr Kellogg is a very successful local attorney who has his eye on the office of attorney general. He is an opportunist, extrovert lawyer whose principles, while high, tend to deteriorate as his ego allows him to rationalize the base, hypocritical deeds of men around him. Burr's half brother, Benson, is a skilled lawyer possessed of a strong character. Unlike Burr, Benson is quiet and laconic and seems willing to suffer undeserved setbacks without rebellion. Joss, the romantic interest in the story, is an astute observer of the quirks and intricacies of life who loved Benson but wished to stir within him some spark of ambition and fight.

A shocking murder brings Burr and Benson into conflict. Burr is appointed defense counsel to defend the young Mexican charged with the crime. Burr, however, considers his political career too pressing to permit him to take the case and he turns it over to Benson. Benson is now taken from his calm existence to defend a client on an issue of law which the legal world had never before considered. Can one man rape another? If so, is

3. *Id.* at 119.

4. *Id.* at 217.

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this adequate provocation for homicide? The murder trial that follows becomes entangled with the character and ambition of the attorneys involved. Benson must decide whether at last to make a stand for his ideals or to yield to political expediency.

Mr. Spicer's highly charged narrative gives the reader an insight into the immoral, unfettered pressures and power which oftentimes manage to corrode and corrupt the best logic of men. In comparison, the reader sees the ethical convictions of one man who refuses to descend into the pit of helpless creatures who have forgotten their capacity to reason and to control their own destinies.

For both laymen and lawyer this book will leave a vivid impression of moral uplift. It presents a realistic picture of the principles and techniques that characterize the competent attorney, and a well constructed and complete dramatization of the legal code of ethics.

JAN M. WILEY

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